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In The
Supreme Court of the United States
October Term 1996

JACK KEVORKIAN,
Petitioner,

v

STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to
the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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I
QUESTIONS PRESENTED

I.

DOES AN INJUNCTION WHICH PROHIBITS, INTER ALIA, "OFFERING" OR "CONDUCTING *ANY ACTS* TO HELP A PATIENT COMMIT SUICIDE REGARDLESS OF THE MODALITY EMPLOYED" IMPERMISSIBLY BURDEN FIRST AMENDMENT RIGHTS?

II.

DO THE PRIVACY AND LIBERTY INTERESTS PROTECTED BY THE NINTH AND FOURTEENTH AMENDMENTS INCLUDE THE RIGHT OF A MENTALLY COMPETENT ADULT WHO IS TERMINALLY ILL OR SUFFERING INTRACTABLE, INTOLERABLE PAIN WITH NO CHANCE OF RECOVERY, TO END THEIR SUFFERING BY ENDING THEIR OWN LIFE?

III.

IS THE EQUAL PROTECTION CLAUSE VIOLATED BY PREMISING THE FREEDOM TO CHOOSE TO HASTEN DEATH SOLELY ON THE BASIS OF WHETHER A PARTICULAR DISEASE REQUIRES THE USE OF LIFE-SUSTAINING TREATMENT SUCH AS A BREATHING OR FEEDING TUBE?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JACK KEVORKIAN, Petitioner,

v.

STATE OF MICHIGAN, Respondent.

OPINIONS BELOW

The Opinion and Order of the Oakland County Circuit Court are not published. (App., *infra,* 12 & 1). The Opinion of the Michigan Court of Appeals (App., *infra,* 3) appears at 210 Mich. Ct. App. 601, 534 N.W. 2d 172 (1995). The Michigan Supreme Court Denial of Leave to Appeal appears at 1996 Mich. LEXIS 769. (App., *infra,* 2).

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 12, 1995. The Michigan Supreme Court denied leave to appeal on April 26, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a) in that the highest court of Michigan denied a hearing in the face of a challenge alleging that an injunction entered against Dr. Jack Kevorkian was repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved here include the First, Ninth and Fourteenth Amendments and prohibitions against laws which are vague and overbroad. (App., *infra,* 33)

STATEMENT OF THE CASE

Petitioner, Jack Kevorkian, M.D., is a graduate of the University of Michigan School of Medicine. He has become known, throughout the United States and the rest of the world, as the leading exponent on the rights of competent adults to end intolerable and irremediable pain and suffering. Receiving hundreds of requests for assistance every year, Dr. Kevorkian has limited his practice to those who have explored all other reasonable courses and who have not gained relief. Most of his patients go on and die naturally, knowing he will be there if they need him.

The patients who consult with Dr. Kevorkian suffer from frightful diseases which have completely destroyed their ability to lead lives free of constant physical torture and misery. These patients are actively smitten with afflictions so horrendous as to preclude any semblance of the enjoyment of life.

Before he will provide patients with assistance, Dr. Kevorkian engages in a rigorous screening process to ensure that the patients have attempted all other reasonable methods of alleviating the pain and torture of their diseases. In each case, Dr. Kevorkian engages in counseling and ensures that the patient is (a) competent; (b) fully informed as to the ramifications of the termination of life; (c) assured that termination of life was not desired by Dr. Kevorkian and that Dr. Kevorkian did not advocate that the patient commit suicide; (d) not subject to coercion or duress; (e) making the decision of his or her own free will, voluntarily and based upon a full explanation of the situation involved; (f) definite and not tenuous with respect to the decision to end suffering through the termination of life; and (g) given a full opportunity to consult with family members, clergy, and other persons from whom the patient may have wished to seek advice and counsel.

Prior to the issuance of the injunction on February 5, 1991, Dr. Kevorkian had assisted one patient, Janet Adkins, who was suffering from Alzheimer's Disease, a degenerative

and ultimately fatal disease. At the time that Janet ended her suffering, she was mentally competent and fully cognizant of the ramifications of ending her life. She did not wish to have the cruelties of her disease further inflicted upon her. Prior to consulting with Dr. Kevorkian, she underwent extensive treatment with other physicians who were unable to prevent the progression of her degenerative disease. While she was still mentally and physically capable of doing so, Mrs. Adkins chose to end her suffering by seeking Dr. Kevorkian's assistance. She was supported in her decision by her husband, her children and her best friend. She traveled from Oregon to Michigan with her husband and ended her suffering on June 4, 1990. The Constitutionally offensive injunction was issued thereafter.

PROCEEDINGS BELOW

On June 6, 1990, Respondent filed a complaint for injunctive relief and a motion for a temporary restraining order. The temporary restraining order was not granted, but the trial court did issue an order to show cause why a preliminary injunction should not be issued. At the conclusion of the hearing on June 8, 1990, at which Petitioner testified, *without counsel, advice that he should retain counsel or notice that he might incriminate himself,* the Oakland County Circuit Court issued a preliminary injunction temporarily enjoining Petitioner, inter alia, from "conducting any acts to help a patient commit suicide regardless of the modality employed."

Trial was held on Respondent's request for injunctive relief in January 1991. The Petitioner did not testify at that trial, and contended that the admission into evidence of his testimony from the hearing on the motion for temporary injunction was in violation of his Fifth Amendment right against self incrimination. On February 5, 1991, the Circuit Court issued an opinion and ordered that the temporary injunction be made permanent. The opinion recognized there may be an individual liberty interest in the right to die, but concluded that this interest

was outweighed by the State's interest in preserving life and protecting innocent third parties. (App., *infra,* 25). The Court noted the "critical difference between the present situation (physician assisted suicide) and prior cases which have upheld the individual's rights of privacy and self determination: the fact that Dr. Kevorkian is the party to this case and to the proposed procedure evidences that the asserted rights at stake are not the rights of privacy and self-determination. The terms "privacy" and "self-determination" belie the participation of another individual. . . patients can not confer a right upon a doctor to assist suicide." (App., *infra,* 25). This reasoning is contrary to this Court's line of abortion cases, which hold that the rights of privacy and self determination necessarily encompass a right to physician aid. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

The Circuit Court noted that the right to remove life support and refuse medical treatment flow from the accepted tenet that the state may not invade bodily integrity. The Court went on: "In the present case, however, there is no state-threatened invasion of the body." (App., *infra*, 25) This is a superficial distinction and violative of Equal Protection. There is a state invasion of bodily integrity and bodily autonomy when it prevents a mentally competent adult from *seeking* medical treatment, just as there is when the state prevents a person from *refraining* from medical treatment.

Petitioner sought review from the Michigan Court of Appeals, arguing that the Circuit Court erred both by denying Petitioner's Motion for Summary Disposition and by issuing a permanent injunction which violated Petitioners right to Free Speech. (App., *infra,* 31). On May 12, 1995 the Court of Appeals issued its opinion, which upheld the rulings of the Circuit Court. At the time of the Court of Appeals decision, the Michigan Supreme Court had just remanded criminal cases against the Petitioner to the Circuit Courts, holding that he could be tried under various Michigan Statutes, and the Common Law.

In light of that recent opinion the Court of Appeals stated "it is now clear that Dr. Kevorkian's claimed legal act was in fact illegal" (App., *infra,* 6) (in fact, on remand, Dr. Kevorkian was acquitted of *all* charges). Although the Court of Appeals cited to other physician assisted suicide cases, recognizing the need to address the fundamental issues involved therein, they avoided the question and held that the lower court ruling could be affirmed because Dr. Kevorkian's action constituted a "threatened violation of life and law" based upon the remand of the criminal charges by the Michigan Supreme Court. The Court of Appeals utterly failed to address the Freedom of Speech issue.

Petitioner applied for Leave to Appeal to the Michigan Supreme Court, raising again the argument that the injunction contained broad, sweeping language that would interfere with Dr. Kevorkian's right to discuss suicide and the means to commit suicide with others. (App., *infra,* 31). On April 26, 1996, the Michigan Supreme Court denied leave to appeal.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to answer the critical question of our time: does a competent adult have a constitutionally protected right to end intolerable pain or suffering, even though the end of such pain or suffering may involve the ending of one's life?

A. The privacy and liberty interests protected by the Ninth Amendment and the Due Process Clause encompass the right of a mentally competent, suffering adult to hasten their own death.

Emanating from our Constitution are implied rights and interests that are no less important to individual liberties than those specifically provided in the Bill of Rights. The Ninth Amendment is the historical recognition that additional rights exist outside the Constitution's plain wording. "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional Amendments." *Griswold v. Connecticut,* 381 U.S. 479, at 488 (1965).

The first step in a Substantive Due Process analysis is to determine whether there is a "liberty interest." If a liberty interest is found, the second step is to balance the liberty interest against the relevant state interests. *Youngberg v. Romeo,* 457 U.S. 307, 321 (1982). As Justice O'Connor explained in her concurring opinion in *Cruzan*, the ultimate question is whether sufficient justification exists for the intrusion by the government into the realm of a person's "liberty, dignity and freedom." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, at 287, 289 (1990) (O'Connor concurring).

Justice Stevens observed that "the concept of privacy embodies the moral fact that a person belongs to himself and

not others not to society as a whole." *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 777, n. 5 (1986). The right to privacy, and the concomitant right of liberty from interference with it, are well established. This Court has historically protected personal choices through interpretation of the Fourteenth Amendment. *See, Loving v. Virginia,* 388 U.S. 1 (1967) [There is a fundamental right to marry a person of another race.]; *Griswold,* 381 U.S. 479 [Married persons have the right to receive medical advice regarding contraception]; *Eisenstadt v. Baird,* 405 U.S. 438 (1972); [Extending the right to unmarried persons].

Under the Fourteenth Amendment there is a line of cases protecting a person's right to personal autonomy, self-determination and bodily integrity. Part of the right to personal autonomy is the right to refuse unwanted medical treatment, *Washington v. Harper,* 494 U.S. 210 (1990), and, of course, the right to choose an abortion, *Roe v. Wade*, 410 U.S. 113 (1973). "In the ordinary course of existence, some decisions remain so personal in nature that society is not in a position to make judgments about their appropriateness. It is difficult to imagine a more personal or intimate choice than determining the nature or extent of one's suffering. . ." *People v. Kevorkian,* 205 Mich. App. 194, 518 N.W.2d 487 (1994).[1] The individual liberty interest in ending one's own suffering during terminal illness

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[1]There are many analogies made between abortion and physician assisted suicide because they involve so many of the same issues: liberty, privacy, bodily autonomy, and protection of life. However, one cannot rationally recognize a liberty which permits a woman control over her body even though it may infringe upon a third party, and not allow a mentally competent adult control over their own body when it does not involve any other "person." Also, the common foe to both rights are generally those whose beliefs prevent them from recognize the freedoms of others, and compel them to vehemently oppose both.

or intractable pain lies within the penumbras of the Ninth and Fourteenth Amendments.

Turning to the second step of Due Process analysis, it is impossible to find that these personal, intimate and painful choices can possibly be outweighed by the states interest in preserving life at any cost. In reaffirming the central holding of *Roe*, this Court noted that pregnancy involves "suffering [that] is too intimate and personal for the state to insist . . . however dominant that vision has been in the course of our history and culture." *Planned Parenthood v. Casey, supra,* at 852. The major opponents of abortion claim that the state must protect the rights of the fetus, who is unable to defend itself. In opposing physician assisted suicide, whom are they protecting? Certainly, it is not the competent adults begging to be released from their tormented bodies.[2] Prolongation of life may cause loss of dignity, unnecessary pain and suffering, while providing nothing beneficial to the patient. Equally important, the state does not benefit from prolonging life under these circumstances.

The state claims that the poor and disadvantaged may be pressured into committing physician assisted suicide and therefore we should not allow it. This same argument was advanced against recognizing abortion rights.[3] Physician assisted suicide is a medical service. The argument that the poor and disadvantaged will receive *more* medical services than the remainder of the population is ludicrous on its face. *Compassion in Dying,* 79 F.3d 790 at 905 (9th Cir. 1996). It is also unacceptably paternalistic. We must trust competent adults

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[2]It is worth noting that in finding a right to abortion this Court weighed the viability of the fetus against the autonomy of the mother. When viability is so diminished, as with the terminally ill, the interest in protecting life is clearly outweighed by right to autonomy.

[3]In fact, a quick perusal of *Roe, supra,* reveals the arguments against assisted suicide are virtually identical to the arguments against abortion.

to make decisions about their own medical needs.

The state has an interest in protecting life. However, the state's interests lose considerable weight when "the choice remaining is not between life and death, but over the terms of the death." *Compassion in Dying,* 79 F.3d 790 at 886.

As advances in science and medicine out-pace the evolution of society, courts are faced with the dilemma of fixing a balance between individual liberty and the State's exercise of its police powers. In performing this juggling act, courts often have been asked to make decisions that will ultimately result in both the end of suffering for a patient and the concomitant end of life. *See, Cruzan,* 497 U.S. 261.

Courts have ordered the discontinuance of life-sustaining medical treatment — an order that inevitably leads to the death of the patient. In reaching such difficult decisions, the court must often determine the wishes of the unconscious suffering patient, who is not always capable of expressing those wishes. The patient-advocate law represents one way in which the Michigan legislature has attempted to address the difficult issues created by modern medical technology. M.C.L. 700.496; M.S.A. 27.5496.

When does the individual's interest in freedom from unjustifiable State interference in personal decision-making outweigh the State's interest in protecting the public health, morals, safety and general welfare? Some would argue that the State has never had the authority to limit or define the liberty interests of the people. Government only has the power which has been delegated by the people and we have never abdicated our right to self-determination. U.S. Const. Amend. IX. Others argue that we only enjoy those freedoms which have been specifically enumerated in the Bill of Rights. Such an argument ignores the very principles upon which the government of this nation was established, would render nugatory the Ninth Amendment to the Constitution of the United States, and would turn on its head the fundamental principle that government is supposed to serve the people, not the other way around.

Following the reasoning of this Court over the past few decades, the State may not intrude into certain personal decisions regarding family, parenthood and bodily integrity. *See, Casey, supra,*. Such reasoning is based on the premise that government cannot govern that which it lacks the power to govern.

The ancient liberty interests of self-realization and self-determination were recognized by the framers of the Constitution. This Court's decisions have not created new rights. This Court's decisions merely have pulled in the reins on a government gone wild; on a government bent on governing where it has no authority to govern; on a government intent upon inculcating personal religious beliefs into the law of the land.

This Court should follow the "essential holdings" of its recent cases that have espoused a right to be free from unwarranted, State-imposed limitations on the exercise of personal liberty, and find that the State of Michigan cannot unreasonably infringe upon a competent adult's decision to end personal suffering through the end of life. *See, Loving v. Virginia,* 388 U.S. 1; *Griswold v. Connecticut,* 381 U.S. 479; *Eisenstadt v. Baird,* 405 U.S. 438.

Indeed, the State arguably has a legitimate interest in protecting life under certain circumstances.[4] For example, the State health code, homicide laws, and regulation of the medical professions are designed to protect life. Does the State's interest in protecting life, though, extend so far as to include an interest in prolonging suffering? Does the State have a legitimate interest in forcing its citizens to endure agonizing pain, suffering and debilitation in the name of protecting life?

In No. 84 of *The Federalist,* Alexander Hamilton assured the people that the authority vested in the new government did not create a sovereign to which the people would become subservient, with the abdication of all rights save those

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[4]Interestingly, no state in this union criminalizes suicide or attempted suicide; no matter how irrational.

specifically reserved by a bill of rights. Hamilton and the other founders of this nation subscribed to the philosophy that men and women, in their natural state, were free beings. The framers subscribed to the notion of the inalienable rights of self-realization and self-determination. The Bill of Rights is not a license, it is not an expression of privilege. The Bill of Rights and subsequent amendments to the Constitution are an expression of a check on the power of government.

The State has advanced the argument that only those rights specifically enumerated in the Constitution are afforded constitutional protection. Hamilton recognized the danger of this argument when he wrote concerning the freedom of the press:

> Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, **to men disposed to usurp, a plausible pretense for claiming that power.** They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was vested in the national government. [Emphasis supplied.]
>
> THE FEDERALIST No. 84 (Alexander Hamilton).

Over the past few decades, this Court and the other courts of this nation have addressed issues of personal autonomy under the precepts of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. The right to self-determination has been said to be found within the zone of privacy inherent in the First and Ninth Amendments, and within the substantive due process and equal protection guarantees of

the Fifth and Fourteenth Amendments.

The First Amendment has a penumbra wherein privacy is protected from governmental intrusion. *Griswold,* 381 U.S. 479. This zone of privacy emanates from the specific guarantees of the Bill of Rights. *Poe v Ullman,* 367 U.S. 497 (1961). The courts have addressed many controversies over the penumbral rights of "privacy and repose." *Griswold,* 381 U.S. at 485. Ultimately, the right to be free from governmental intrusion upon one's own body is secured by the privacy rights which emanate from the liberty provisions of the First and the Fifth Amendments.

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Thus, in plain English, the Founding Fathers consigned to the rubble heap the notion that a right must be specifically enumerated in the Constitution in order for the people to possess it. The right to end suffering need not be specifically guaranteed by the Constitution, for it may be found within the penumbra of privacy and freedom recognized and protected by the Ninth Amendment.

This Court has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. *Griswold,* 381 U.S. at 486, n 1. The Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause has been understood for well-over a century to contain a substantive component as well as a procedural one. The Due Process Clause also bars "certain government action regardless of the fairness of the procedures used to implement them." *Daniels v Williams,* 474 U.S. 327 (1986).

All fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. *Whitney v California,* 274 U.S. 357, 373 (1927). "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey,* 503 S Ct

at 847. As was recognized by Justice Harlan over thirty years ago:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This liberty' is not a series of isolated pointspricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a **rational continuum** which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a **reasonable and sensitive judgment** must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. (Emphasis supplied.)
> Poe, 367 U.S. at 543 [Harlan, J., dissenting.]

Dr. Kevorkian asserts that, absent a compelling state interest, government is without power to abridge an individual's right to self-determination. The individual's liberty interest in self-determination cannot be made subject to the whims of "men disposed to usurp" the power retained by the people. The State would urge this court to legitimize the usurpation of power by men claiming that only God can determine the time of death, that the people never have possessed the right to self-determination, and that those professing such a right are guilty of blasphemy. Undoubtedly, there are those on this Court who feel similarly. It is also clear that those on this Court who so believe will deny such beliefs and seek to impose governmental control over bodily function under a set of inane justifications intended to obfuscate the real reasons.

"It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions

about family and parenthood, . . . **as well as bodily integrity.**" [Emphasis supplied.] *Casey,* 505 U.S at 849.

In dealing with the issues of the cessation of life-sustaining medical treatment, this Court has addressed whether a state may require proof, by clear and convincing evidence, of an individual's wishes regarding the withdrawal of such treatment. *See, Cruzan,* 497 U.S. 261. In addressing the question, this Court acknowledged that a competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment. *Cruzan,* 497 U.S. at 270.

A competent individual has a liberty interest in refusing unwanted medical treatment, including treatment that often means the difference between life and death. A person can discontinue life-sustaining treatment, an act that inevitably ends in death. In order to discontinue the treatment, a doctor or other health care professional must disconnect the apparatus that is supplying the treatment. The act of disconnecting the life-sustaining treatment is no different from the act of connecting a life-ending apparatus. To attempt to distinguish between withdrawing life-support thereby suffocating or starving an unconscious patient to death, and not providing similar means to a conscious suffering patient, is absurd. *See, Cruzan,* 497 U.S. at 292-301 [Scalia, J., concurring.] In fact, for thirteen years, Michigan Right-to-Life held up passage of the Patient Advocacy/Living Will bill in Michigan by falsely claiming that withdrawing life-support was murder. If abortion is a fundamental right (and it arguably involves a third party), *Casey, supra;* if withdrawing life support to surely cause death is a fundamental right, *Cruzan, supra;* then controlling one's own life certainly must be fundamental. To find otherwise would be irreconcilable with this Court's decisions in *Casey* and *Cruzan.*

If an individual may designate a third party to order discontinuation of life-sustaining treatment when the individual is no longer capable of expressing the desire to refuse treatment, why cannot a competent person request assistance in ending

the suffering pain of his or her affliction? Why does the State's interest in protecting life extend to one act and not to the other?

The constitutional issues raised in this Petition have been addressed by the United States Court of Appeals for the Ninth Circuit in *Compassion in Dying,* 79 F.3d. 790. The plaintiffs in that case asserted that the Fourteenth Amendment to the United States Constitution guarantees adults who are mentally competent, terminally ill, and acting under no undue influence, the right to voluntarily hasten their death by taking a lethal dose of physician-prescribed drugs, and on equal protection grounds. *Compassion in Dying, supra..* The Court of Appeals, following the reasoning espoused by this court in *Casey*, found that the right to end one's suffering during a terminal illness is embodied in the liberty interests protected by the Fourteenth Amendment.

This Court, in *Casey,* pronounced the following:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. **At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."** [Emphasis supplied.]
> *Casey,* 505 US. at 851.

The Court therefore found unconstitutional a state statute imposing criminal sanctions for physician-assisted suicide. *Compassion in Dying, supra.*

This Court's decision in *Cruzan* is also instructive. In *Cruzan,* this Court had to decide whether a competent person has a constitutionally protected liberty interest in refusing unwanted, life-sustaining medical treatment including artificially delivered nourishment essential to life. In the

majority opinion written by Chief Justice Rehnquist, this Court acknowledged that the logic of its prior decisions embraced just such a liberty interest. This Court held that the United States Constitution grants a competent person the right to refuse life-sustaining medical treatment. *Cruzan*, 497 U.S. at 278-279.

In Oregon, on November 8, 1994, the citizens of that State, recognizing the need for compassion and flexibility in situations involving terminal illnesses, approved a provision which specifically permitted medical assistance in ending life under specified guidelines. The effective date of that law has been stayed pending litigation which may eventually find its way to this Court.

In *Quill v Vacco*, 80 F.3d 716 (2d Cir. 1996), the United States Court of Appeals for the Second Circuit declared unconstitutional New York statutes which prohibited physicians from assisting in suicides of terminally-ill, mentally competent patients who voluntarily elected to forgo the ravages of disease and the concomitant pain and suffering by ending their lives.

In certain cases, the only realistic means of alleviating the pain and suffering is termination of life. If the choice is between ending the pain and suffering through termination of life on the one hand, and continuing horrendous suffering on the other, some competent adults, freely, knowingly and voluntarily will choose not to suffer. Not everyone so afflicted has the ability to end the suffering by themselves. The question is whether government should or may impose itself on these people to force them to suffer against their will. It cannot.

B. It is a denial of Equal Protection to afford to persons on life support the right to hasten their death, with the assistance of others, while denying such right to those suffering from terminal illness or intractable pain and agony but who are not on life support.

When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose. See, *Hooper v. Bernalilo County Assessor,* 472 U.S. 612.

This Court, in *Cruzan*, held that persons who are on life support have a right to have such life support terminated if they had indicated clearly and unequivocally that they wished to do so. *See, Cruzan*, 497 U.S. 261. Justice Scalia recognized that distinguishing between assisted suicide and termination of life support was a distinction without a difference. It is generally recognized that removal from life support will hasten death in most cases. Thus, if a person is on life support, under *Cruzan* that person will be able to receive assistance in hastening death and terminating life.

If it is permissible for a person who is on life support to receive assistance in terminating life, why is it impermissible for one not on life support to receive the same type of assistance? The person who is not on life support undoubtedly suffers far more than a person who has lost consciousness. The person who is not on life support may have a far more compelling reason to end life than one who is comatose and on life support. To give a right to the comatose person on life support which right is not afforded to the consciously suffering individual who is not on life support is a denial of equal protection.

There is no rational basis upon which the state can compel one who is consciously suffering to continue that suffering while allowing the person who is not consciously suffering the option of ending his or her existence. The state should have no interest in the prolongation of conscious suffering which cannot reasonably be relieved.

Yet, by enjoining Dr. Kevorkian from even providing information to those who are consciously suffering to end that suffering, the State, through the injunctive process, impermissibly deprives those persons from gaining access to

relief from suffering while allowing those who do not consciously suffer the ability to gain relief by ending their lives.

To elevate the rights of those who do not consciously suffer over the rights of those who are subject to conscious suffering is without a compelling state interest and violates the Equal Protection Clause.

Those who oppose physician aid in dying have attempted to distinguish the removal of life support and the provision of lethal doses of medication by which a patient may self administer relief by claiming that the first is *omission*, while the latter is *commission*. They propose that the omission is not physician assisted suicide because it merely allows the patient to die of natural causes. However, it is clear that withdrawing food, water or respiration is not an omission, it is an overt act. Furthermore, this distinction results in allowing a person to choke or starve to death, but not to self-administer medication so that they may die painlessly and quickly. This can not possibly be the result that is intended. *Cruzan* should not be read as a half step when that would result in greater suffering. Additionally, this distinction fails to recognize that in both situations the death of the suffering patient is the intended/known end. Moreover, the writing of a prescription to hasten death involves a far less active role for the physician than asphyxiation, starvation and/or dehydration. It simply can not be said that those mentally competent, physically suffering adults, who seek to hasten death but whose treatment does not include life support are treated equally.

After finding unequal treatment, the next step is to assess if it is rationally related to some legitimate state interest. Michigan has contended that it has an interest in preserving the life of all its citizens at all times and under all conditions. But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes. See, *In re Quinlan,* 70 N.J. 10, 41, cert. denied, 429 U.S. 922 (1976).

Society should be concerned for unsolicited death, but

this concern can be placated by insuring review of the desire to end life. The argument that a doctor cannot draw a line between people who are terminally ill or intractably suffering and those who are not, ignores that doctors make crucial, life and death decisions based on these types of diagnoses every day. The Court in *Cruzan* indicated that the state's interest in the preservation of human life was subject to the more important Fourteenth Amendment rights of the individual. *Cruzan,* 497 U.S. 261.

"It is also clear that the proposition recognized by *Cruzan* is one of general applicability and not limited to the terminally ill. *Cruzan,* 497 U.S. at 278. Indeed, Nancy Cruzan was not terminally ill, and as the court noted medical experts testified that she could live another thirty years.'" *Id.* at 266 n. 1. Thus, this Court could not have resolved the case as it did by finding a liberty interest only in the terminally ill. *Compassion in Dying,* 79 F.3d at 863 n. 69.

The distinctions drawn between the rights of suffering people on life support and those who do not need life support amount to distinctions without a difference. In the words of Dr. Quill: "it seems unfair to base freedom of choice on arbitrary elements of a condition which determine whether a person is on life sustaining treatment or not." *Quill v. Vacco,* 80 F.3d at 732.

C. An injunction which prohibits a citizen from "offering" or "conducting any acts to help a patient commit suicide regardless of the modality employed" is overbroad, vague and amounts to a constitutionally repugnant prior restraint of free speech.

Even a legitimate goal (Petitioner contends that this injunction does not have one) "can not be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479 (1960). The state could protect life and innocent third parties through regulation of physician assisted suicide.[5] As

for protecting the integrity of the medical profession, would not that goal be better accomplished by physicians assisting patients who may desperately need their help to avoid unbearable pain and undignified death? This injunction is not "narrowly tailored" to the State's interest, it is an example of broad government censorship. It amounts to a ban on Dr. Kevorkian's even talking about suicide, from disseminating information and advocating positions on matters of public concern. This injunction is offensive to a Constitution which seeks to insure the free exchange of ideas.

The injunction against "offering" and "any acts" amounts to a complete ban on future expression of Dr. Kevorkian's ideas, and is not justifiable under any of the exceptions enunciated by this Court.[6] See, *Near v. Minnesota*, 283 U.S. 697 (1931). The injunction prohibits actions of the Petitioner that would clearly be constitutionally protected for all other citizens and is exactly the type of abuse of authority the constitutional barrier was erected against.[7]

The language of the injunction is so broad and sweeping that it prohibits Dr. Kevorkian from providing communications to anyone who might seek assistance in the ending of life. Subsequent to said injunction, Dr. Kevorkian published a book entitled *Prescription: Medicine, The Goodness of Panned Death* (Prometheus Books, 1991). The language contained in the injunction is so sweeping that it makes the publication of such a book impermissible.

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[5]"The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." *Cruzan*, 497 U.S. at 281

Any form of prior restraint is heavily suspect and only justified in instance of threats to national security, obscenity, incitements to governmental overthrow or other violence, or interference with private interests.

Dr. Kevorkian has appeared on television and radio since the issuance of the injunction, advocating the right of citizens inflicted with incurable or terminal diseases to end their suffering by committing suicide, if need be. The language of the injunction is so sweeping that such appearances by Dr. Kevorkian are impermissible because statements by Dr. Kevorkian may help a patient commit suicide. The decretal paragraph of the order states as follows:

> IT IS HEREBY ORDERED that for the reasons set forth in this Court's Opinion of February 5, 1991, Defendant Dr. Jack Kevorkian, his agents and employees, and those in active concert or participation with him, shall be and hereby are permanently en joined from: using, employing, administering, **offering**, or providing any of his suicide machines' or other similar devices, contrivances or other modalities or drugs (including non-prescription drugs) on, or to, any persons seeking to end a human life, or conducting **any acts to help a patient commit suicide regardless of the modality employed.** (Emphasis supplied).

This Court has been assiduous in recognizing and

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[7]*See,* Derek Humphrey, Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying. (Dell Publishing Co.) 1992

See also, This Court may recall a story of a few years ago where a student, through researching documents within the public domain, compiled blueprints for the construction of a homemade nuclear device. The blueprints were eventually published in a journal. Even though the publication of such plans posed a potentially cataclysmic threat to the general public, the publication was sheltered by the Freedom of the Press and the Freedom of Speech. Progressive Magazine 1979.

protecting the rights of citizens under the First Amendment to engage in free expression of ideas, even if those ideas were considered repugnant. More than half a century ago, in *Near, supra,* this Court held that except under the most unusual of circumstances, such as when, in wartime, the government seeks to prevent the publication of sailing dates of troop ships or the location of troops, the state may not interfere, in advance, with freedom of expression and publication of information. In *Cantwell v Connecticut,* 310 U.S. 296 (1940), this Court found that the liberty of free expression was important to the fabric of American life. This Court has continually found that prior restraint for publication of ideas and information is constitutionally impermissible except under the most rare of circumstances which do not apply herein. *See, Nebraska Press Asso. v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States,* 403 U.S. 713 (1971).

The injunction imposed by the Oakland County Circuit Court flies in the face of this Court's holdings and constitutes an overt impermissible breach of Appellant's First Amendment rights. For it prohibits him from "offering" or conducting "any acts to help a person commit suicide regardless of the modality employed." The injunction does not limit the acts which could include verbal acts as well as physical acts. Moreover, "offering" can only constitute speech. Thus, the very breadth of the order prohibits Dr. Kevorkian alone from engaging in any communicative acts from which a person might gain some knowledge to commit suicide. As such, he is enjoined even from stating the obvious, to wit: that shooting oneself in the head is an effective way to commit suicide. Dr. Kevorkian should not be the only citizen so treated.

If Dr. Kevorkian can be prohibited from communicating with other persons regarding options of which they may wish to avail themselves to relieve interminable pain and suffering simply because his methods do not comport with the beliefs of a judge or even with the a large portion of the Establishment, who can ever be safe in espousing controversial ideas or

information? It is not that communication which is acceptable to government which needs protection. By definition, governmentally acceptable speech has the blessing of government and is not likely to be suppressed. Rather, it is speech which may be viewed as unconventional, "politically incorrect" or even obnoxious which needs and is entitled to protection.

The injunction must be struck down as being patently offensive to the Constitution of the United States. Surely, we have not come to the point where this Court will ever sanction a prior restraint upon any citizen for offering an act of kindness.

II. The Michigan Court of Appeals Decision conflicts with other courts that have considered the issue, including the Court of Appeals for the Second and Ninth Circuits.

A conflict between decisions of a highest state court and a federal court of appeals on a question of federal law is ground for granting review of either decision. *See, Katziger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947).

The Ninth Circuit, sitting en banc, held that mentally competent, terminally ill adults have a "constitutionally-protected liberty interest in determining the time and manner of [their] death," and that this right necessarily entails access to medical assistance in the form of obtaining a prescription for drugs that can be self administered to assure a certain, humane and dignified death. *Compassion in Dying v. Washington*, 79 F.2d at 793.[8] In balancing the state's interest against the individual's, the court concluded "unhesitatingly" that the balance favors the individual's liberty interest. *Id.*, at 814.

The Second Circuit Court of Appeals held two New York statutes unconstitutional which penalized assistance in suicide to the extent that the statutes prohibit physicians from acceding to requests of terminally ill, mentally competent patients for drugs to hasten death. *Quill v. Vacco*, 80 F.3d 716. The court

criticized the disparate treatment now afforded to those patients on life support who wish to end their life, and those not on life support who also wish to end their life, and proclaimed that this distinction did not rationally further any legitimate state purpose. *Quill,* 80 F.3d 716.

The injunction issued against Dr. Kevorkian is directly contrary to these two decisions proclaiming physician assisted suicide a constitutionally protected activity. Therefore, this Court should grant the petition for certiorari to determine which of these holdings applies the correct constitutional analysis.

III. The Question Herein is Important.

The question involved herein is an important one, not only to the Petitioner, but to the country as a whole. With new and insidious diseases, such as AIDS, wreaking havoc on thousands of our citizens, and with persons living longer and becoming subject to diseases which were known primarily in textbooks, if at all, the citizens of this nation are faced with increasingly serious questions regarding their own destinies.

There are those who may wish to live to the last breath, irrespective of the agony and torture which the cruelties of

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[8]Right to die cases have not been limited to terminal patients. In Washtenaw County Michigan, [In re Blodgett (83-26514-AZ)] a non terminal quadriplegic, who was even able to operate a motorized wheel chair, was allowed to be removed from his portable ventilator because his quality of life was unbearable. That was also the result in *Bartling v. Superior Court, et al.,* 163 Cal. App. 3d 186 (1984).

The New York Court of Appeals allowed a respirator to be removed from a patient after his guardian proved that prior to becoming incompetent, the patient had consistently expressed his view that life should not be prolonged if there was no hope of recovery. *In re Eichner,* 52 N.Y. 2d 363, cert. denied, 454 U.S. 858 (1981)

disease may consign them to suffer. Yet, there are others who may wish not to be victimized in all the horrible manner which some of the most notorious diseases visit upon their casualties. Should an adult, competent individual be forced by the State to endure the torture and suffering of unspeakable diseases against his or her will? May government, under the rubric of "protecting life", subject an unwilling participant to that type of torture which this Court would prohibit being inflicted upon a convicted murderer as being cruel and unusual punishment in violation of the Eighth Amendment?

The position of the State herein is a radical extremist position—an absolute prohibition on a competent adult's ability to obtain assistance of any kind, under any circumstances, for any reason, to end physical suffering if the assistance is designed to help that person end his or her own life.

As this nation embarks upon the 21st Century, these questions need to be answered by the highest Court of this land so that the law may be applied fairly and uniformly and so that the victims of catastrophic and tortuous physical infirmity may know that they need not be victimized twice—once by disease and a second time by their own government.

The opening paragraph of the Ninth Cicuit limited *en banc* panel opinion correctly notes: "This case raises an extraordinarily important and difficult issue . . . It requires us to confront the most basic of human concerns — the mortality of self and loved ones — and to balance the interest in preserving human life agains the desire to die peacefully and with dignity." *Compassion in Dying,* 79 F3d at 793. The court further recognized that this is a "controversy that may touch more people more profoundly than any other issue the courts will face in the foreseeable future." *Id.,* at 794.

CONCLUSION

It is respectfully requested that this Honorable Court grant this Petition for Certiorari and set this case for full briefing, oral argument and decision.

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